ACCESSION TO THE EU AND THE CZECH GENERAL JUDICIARY

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1. Introduction – Links between the Czech Justice and the European Union structures

The accession to the EU has implications for the Czech judiciary at a number of levels. This analysis deals with the horizontal impacts of EU membership on the Czech general courts (other courts than the Constitutional Court), i.e. problems that affect most Czech courts and related institutions regardless of a particular field of law. After the accession to the EU the key problems for the Czech judiciary will be the following: the preliminary question; decision-making regarding compatibility of the Czech law with the EC/EU legislation; compensation for damages resulting from the Czech Republic's breaches of the EU/EC law; representation of Czech national interests in legal disputes brought before the European Court of Justice; representation of Czech national interests and positions in the preparation of the secondary European legislation; selection of Czech judges for the European Court of Justice (ECJ) and the Court of First Instance (CFI) in Luxembourg.

As a consequence of the accession to the EU, the Czech system of law has been linked to the EC/EU legislation; Czech courts have been integrated into the system of EC/EU courts and are therefore obliged to apply the EC/EU legislation. There are two ways the legal systém of the Czech Republic can be interconnected with the system of the European law:

- Through explicit and detailed regulations of the Czech system of law. An example of this could be an explicit modification of the Czech procedural legislation (the Code of Civil Procedure, the Code of Criminal Procedure and the Administrative Procedure Code), which would enable Czech courts to refer to the ECJ with the preliminary question. The advantage of this approach consists in a high degree of legal certainty and better awareness of this phenomenon among both experts and the general public. The negative aspect of it is the potential deformation of the acquis communautaire in the implementation process, and the fact that the EC/EU law itself prevents member states from the implementation of some types of European legal norms (regulations). Another disadvantage of this method is an unclear definition of responsibility for adherence to the acquis – the courts will tend to blame the executive bodies for undue implementation of Czech legal commitments according to the EU law (and for obstructionism hampering the activities of the Czech judiciary), whereas the legislative bodies will, if criticised, emphasize the independence of courts and their responsibility for the application of the European law. A negative aspect of the detailed regulations within the Czech legislation is also their inescapable rigidity; the Czech regulation often embraces only a limited number of details of the European legal regulation, and so the

absence of an explicit regulation in the remaining part of the acquis can be used as an argument against their enforcement/application.

- Through a general system of relation between the Czech and the European (and international) law, as they have been established by the "Euro-amendment" to the Czech Constitution. The "Euro-amendment" completed the "monisation" of Czech relationship to the international law; in the "post-Euro-amendment" era, duly ratified and declared international legal norms are an integral element of the Czech system of law and can as such be applied by Czech courts. In addition to that, the general courts have been vested with an authority to decide on the issues of compatibility of (common) laws with international legal norms – should contradictions arise, the general courts are entitled to give precedence to the application of the international norm. The decentralization of the judicial review does not, however, apply to the assessment of compatibility between the ordinary and constitutional laws – this authority is still held exclusively by the Constitutional Court. According to the definition in the "Euro-amendment" it is possible to view the European acquis communautaire, including the secondary EU legislation, as parts of the international law. The positive aspect of this method (a method introduced by the "Euro-amendment") is that it is simple and elegant. The major drawbacks are, on the other hand, the overburdened general courts and (at least in the beginning) considerable uncertainty of participants in proceedings as to their actual rights and duties. The advantage is a more flexible reaction to the development of jurisdiction of the European Court of Justice.

A possible compromise between the two approaches is a minimum reference clause in the Czech system of law, which will automatically reflect e.g. the development of the secondary EU legislation and the development of the ECJ jurisdiction, and create awareness of the relevant legal institute within the Czech system of law. The Czech reference clause should, however, not limit the use of the European law (due to a direct effect of the European law). Moreover, the Czech Euro-amendment has been so far interpreted in various ways. Particularly important are debates (for the most part at the academic level) that concern the relation between Article 10 and 10a of the Constitution. The controversial question is whether the application of the European law in the Czech Republic should comply with the "European" Article 10a only, or whether both Article 10a and the general clause on international law in Article 10 should be observed.

2. The preliminary question

According to the European law the courts and tribunals of the EU Member States have a right and (in some cases) duty to refer to the ECJ for guidance in currently discussed issues relating to the interpretation of EU legislation. The institution of the preliminary question is one of the most used instruments of interpretation (and due to the ECJ jurisdiction also one of the most used instruments of creation) of the European law – about 50% of the current ECJ case load relates to preliminary questions (in 2002, out of the total of 513 judicial judgments there were 241 preliminary questions, in 2000 there were 268

preliminary questions out of 526 judgments). In the past, decisions made in connection with the preliminary question considerably affected system qualities of the European law (Costa, Simmenthal), of the domestic market (Cassis de Dijon, Keck), and of the protection of human rights (Marshall).

Should the corresponding court fail to ask the preliminary question, the Member State can be accused of breach of duties ensuing from the acquis communautaire. Such a failure can also lead to a sentencing judgement issued by the European Court of Justice and financial liability of the state to private parties damaged by violation of the EC law by member state. Nevertheless, the ECJ has repeatedly refused to acknowledge the existence of an independent justice, as this would discharge Member States from the responsibility for breach of the European law. Preliminary questions are therefore not only a strictly technical problem of the Czech justice but also an overall problem of the Czech Republic as a whole. Since the individual "Euro-amendments" to the Czech rules of procedure (the Code of Civil Procedure, the Criminal Procedure Code, the Administrative Procedure Code) are still in the process of legislative enactment, the modification of some questions remains unsolved.

The main points that require clarification:

- A definition of courts that are bound to submit preliminary questions to the ECJ, i.e. courts whose judgments in individual cases cannot be reversed on appelate procedure. There are some interpretation ambiguities at this point, e.g. whether the possibility to bring complaints to the Constitutional Court can be, in terms of the European law, regarded as a remedial measure. The courts considered as bound to submit the preliminary question should probably be all courts of appeal, no matter if extraordinary relief or constitutional complaint is admissible to be lodged against their decisions. Even broader is the obligation of the courts to refer in cases when they have doubts about the validity of the secondary European legislation.
- A definition of entities that are entitled to but not bound to refer to the ECJ. Clearly, all courts of law will be authorized for such actions; however, the holders of authorization can be defined in broader terms – the European law uses the terms "court or tribunal of the Member State". Having said that, this term is included in the European legal terminology, and it is the European law itself that defines the institutions falling into this category. The entities that would possibly comply with the definition in the Czech Republic are e.g. also professional self-governing bodies with quasi-judicial competences: the Czech National Bank or the Council for Radio and Television Broadcasting. An explicit regulation imposing a duty of preliminary question on these institutions is not very likely, and so their (un)willingness to take such actions will be based on a direct application of the European law.
- Dispute parties involvement in the formulation and submission of the preliminary question. The final decision about the submission and formulation of the preliminary question is made by the court. Participants in the proceedings are, however, entitled to propose the submission of the preliminary question – it has, however, not yet been resolved what form the proposal should have and whether the participants should be

informed about this possibility. Similarly, it has not yet been made clear what remedial measures against the judicial resolution regarding submitting (or not submitting) the preliminary question will be available to the participants. Another question that should be settled is the possible intervention of the Czech State into the given proceedings – intervention on behalf of a higher public interest?

- Should the system of preliminary questions be the same for all types of proceedings, or should the specific nature of e.g. criminal proceedings be duly reflected? The person entitled to file a complaint against the (non)submission of the preliminary question will be with all probability only the prosecuting attorney.
- The submission of preliminary questions can substantially prolong the judicial procedure (in 2002, the average length of the ECJ proceedings dealing with a preliminary question was twenty-four months). Can delays caused by preliminary question proceedings provoke a complaint to be lodged with the European Court of Human Rights (ECHR) for the infringement of guarantees of a due process in compliance with the European Convention on Human Rights?
- In the past the ECJ showed considerable benevolence in dealing with "inadequately formulated" preliminary questions submitted. In some cases it was even willing to change the formulation of the submitted question so that a meaningful answer to it could be found. The latest trend, however, is marked by an effort to set up definite rules for the submission procedure – in more and more cases the ECJ refers to its former resolutions (a practice enabled by the modification of the procedural legislation), and it has also furnished the Member States' courts with guidelines as to how a correct submission of preliminary questions should be made (Guidance on Reference by National Courts for Preliminary Rulings). The question is to what extent Czech judges are familiar with these rules – and, additionally, to what extent they have been acquainted with the ECJ jurisdiction, which is discussed in specialized literature rather thoroughly. This material has not yet been officially translated but it is available in unofficial translations.
- The preliminary question probably will not be solved by a single piece of legislation but rather separately, in individual procedure codes – e.g. an amendment to the Code of Civil Procedure is currently being drafted under the auspices of the Ministry of Justice, and a modification of the Administrative Procedure Code is being prepared under the aegis of the Ministry of the Interior. The incorporation of the preliminary question into the codes of Criminal Law will be probably connected with other "novelties". Among the issues to be discussed will be e.g. the implementation of the European arrest warrant in the Czech Republic.

Assessing conformity of the Czech law with the EU legislation

Pursuant to the "Euro-amendment", Czech courts are entitled to decide whether a relevant Czech legal norm that should be applied in the particular legal case is compatible with Czech international commitments, including those that are implied by the European law. The main problems in this area are the following:

- The willingness of Czech general courts to face objections raised by the involved parties on the grounds that the Czech regulations are not compatible with the European law.
- The coordinative function of presidents of the individual courts, the president of the Supreme Court, and, possibly, the president of the Constitutional Court in the review proceedings. The establishment of special senates for review purposes? A similarly contentious issue is the unification of the decision-making practice in relation to the decision about incompatibility (or compatibility) of a given law with the European law that are rendered by the corresponding court (in particular by courts of primary jurisdiction). In the Czech Republic there is no principle of judicial precedent, which, in combination with the lack of information on both sides, can lead to conflicting decisions – at least a partial solution to this question could be the establishment of a special information database or consolidating activities of the Supreme Court. This database is being prepared, however, it will be likely accessible only to courts, to the prosecuting attorney's office and to the Ministry of Justice.
- Interconnection with legislation. A resolution about incompatibility of a Czech law with the European law does not imply an extinction of the Czech norm. The principle of precedence of the European law over Czech norms requires its precedence in application but not necessarily in validity. A situation may arise that the Czech law cannot be applied in cases related to the Community (typically in proceedings conducted against citizens of another EU Member State) but it can be applied in other cases (e.g. in proceedings involving citizens of non-member countries). In order to uphold the principles of legal certainty, the Czech legislation should react to the courts' decisions about the discrepancies between the Czech and European law e.g. by an explicit definition of application norms for cases related to the Community.

Involvement of the Czech Republic in the legal disputes before the ECJ

The European law will not affect the Czech judiciary only at the national level. The Czech Republic can become a participant in disputes at the European level – i.e. in disputes before the ECJ. A serious situation would arise if the European Commission lodged a petition against the Czech Republic for breach of acquis communautaire. It would be equally serious if the Czech Republic contested the validity of the secondary European legislation on the grounds of its discordance with the primary EU legislation. Further, it is useful to define a situation when the Czech Republic asks for a judicial review (if this is possible) of sanction measures against the country, which the European Commission may take during the three-year transition period after the accession of the Czech Republic to the EU. Considering the involvement of the Czech Republic in the legal disputes before the ECJ there is also the possibility that in some proceedings the Czech Republic steps in as an enjoined party whose concerns may be seriously affected.

Main problems:

- Which institution will be responsible for representing the Czech Republic in cases brought before the ECJ. The key role in representing the Czech Republic before the ECJ will be played by the Ministry of Foreign Affairs and by the office of the deputy for representing the country before the ECJ. Nevertheless, it is still not clear to what extent

the Czech Republic will benefit from its experience made in the proceedings before the European Court of Human Rights, and what role specialised law offices will actually play.

- The time limit for the initiation of proceedings on the grounds of invalid secondary EU legislation is relatively short – the proceedings have to be opened within two months from the publication of the norm in the Official Journal (if the norm is not published, the time limit begins on the day of delivery). What mechanism will ensure that by the end of the two months, the Czech position will have been formulated and a possible suit filed, so that the Czech position is stated and the complaint lodged within a relatively short time? The person in charge of coordination will be the newly appointed government deputy for representing the Czech Republic before the EU tribunals. This position will be analogous with the already existing position of the deputy for the ECHR. Similarly, a negative position of the Czech Republic towards the adoption of a particular norm (defeated by a majority of votes) should be considered an impulse for the initiation of review proceedings before the ECJ.
- The Czech Republic is entitled to oppose whatever norm of the secondary legislation without any obligation to prove its interest in the (non)existence of the corresponding norm – the Czech Republic is what is referred to as the privileged participant. The actions of the EU can affect not only the interests of the Czech Republic as a whole but also the interests of a singe part of its constitutional system, e.g. the judiciary or a particular region. The Czech court will be entitled to contest a norm of the secondary EU legislation only in exceptional cases (e.g. if the court is a direct addressee of the norm); in the majority of cases the action will have to be brought in the name of the Czech Republic. It should be resolved by what formal announcement the affected parties of the Czech administrative system (in this case the courts) will declare their wish that the Czech State takes the relevant legal actions – should the Supreme Court or the judicial self-governance bodies be involved here?
- Should the Czech Republic provide assitance to Czech private entities that will become involved in disputes "at the European level" – typically, a Czech firm that will oppose a sanction imposed by the European Commission for breach of the European competition law?

A special question was the nomination of a Czech judge for the European Court of Justice and for the Court of First Instance. The candidates for ECJ judges were nominated by the Constitutional Court, the Supreme Court, the Supreme Administrative Court and the deans' offices of Czech Law Faculties. The position of the CFI judge is to be filled in compliance with the results of a competitive selection procedure. The names of the candidates and their substitutes who were short-listed by the Minister of Justice and the Minister of Foreign Affairs were submitted to the government for approval. The involvement of the Czech Parliament in this procedure was only limited. In comparison with the nomination of the Constitutional Court Justices or of the Czech representative for the European Commission, the competitive examination for the position of "European judges" attracted little public attention. However, it can be expected that the nomination of the ECJ/CFI judges for the next term will arouse more public interest, just as the selection of the

Constitutional Court Justices got into the centre of public attention when the Constitutional Court had proved to be an important figure on the Czech political scene.

Negotiations in the Council of Europe, workgroups, the COREPER, EP committees, "commitology"

An important role in the process of European integration is also played by the secondary EC/EU legislation, i.e. the legislation adopted by EU institutions. The secondary legislation will be prepared in cooperation with representatives of the Executive, while the most important representative of the judiciary in the preparation processes will be the Ministry of Justice. It is also possible that the representatives of the judiciary will be directly involved here – it will be either a delegated active judge or a judge temporarily engaged in the Ministry of Justice. Compared to other EU policies, the scope of the agenda of the committees or workgroups is relatively limited. The presidents of courts whose judges are delegated as representatives for negotiations in the European institutions are, in most cases, willing to excuse the absence of their colleagues. The problems that arise are of a more practical nature, such as the flexibility of delegation procedures or financing of the travelling expenses of judges who are not members of the Ministry's staff.

Compensation for damages ensuing from breach of the European law by the Czech Republic

Each EU Member State is liable to damages resulting from breach of the EU legislation. The liability to damages is assessed separately by the courts (or other bodies) of the particular Member State, which means that the principle of procedural autonomy of the individual Member States remains respected. The compensation for damages ensuing from breach of obligations stipulated by the European law must be effective (it must enable an effective compensation) and it has to be at least equal to the compensation for damage caused by the State's breach of the national law. The involvement of the ECJ in the compensation trial is only indirect – it happens especially through the ECJ jurisdiction (Factortame, etc.). This situation might be resolved by an amendment to the Czech regulation that deals with damages ensuing from breach of the Czech law. It would be, however, inevitable that such a "Euro-amendment" broaden the liability framework of the Czech State, especially in connection with damages caused by the adoption and enforcement of laws that are contradictory to the EU legislation. As Czech legislators might reject such explicit obligations and oppose the adoption of an explicit regulation, the first actions for damages might be based directly on the EU legislation. According to the latest ECJ jurisdiction, an activity of the court itself can provoke a justified action for damages – it has not been settled, for example, whether the right of damages arises in cases where the court fails to submit (or correctly formulate) the preliminary question although the submission is required by the European law ("Köbbler II" case).

Conclusion and recommendations:

- Links between the Czech judiciary and the EU legislation will be based on Article 10 (a direct effect of international law in the Czech Republic) and Article 10a (transfer of competence from the Czech Republic to the EU according to the Accession Treaty). Although most duties of Czech courts can be nferred from the EU legislation, the legal certainty of the Czech general public can only be ensured if the Czech system of law contains at least a general reference to an applicable European law. This reference should be sufficiently flexible. It should reflect the development of the EU legislation even without an explicit amendment to the Czech law, and none of its interpretations should justify attempts to reduce the duties of Czech Courts relating to the application of the EU legislation.
- Preliminary questions submitted by Czech courts to the European Court of Justice. The courts bound to submit preliminary questions should be primarily the courts of appeal, no matter if extraordinary relief or constitutional complaint is admissible to be lodged against their decisions. With the exception of courts, the Czech law will probably contain no explicit definition of institutions that are entitled by the European law to submit the preliminary question by virtue of their status of "tribunals" (the eligible entities for this position would be e.g. the Czech National Bank, the Council for Radio and Television Broadcasting or the disciplinary tribunals of the professional chambers) – these institutions are entitled to but not bound to submit the preliminary question.
- The accession to the EU will establish the duty of the general courts to apply the EC/EU legislation and to ignore the Czech law (general laws and delegated legislation) if this contravenes the EC/EU legislation. It will be necessary that Czech judges familiarize themselves with the corresponding norms and give a fair hearing to the involved parties that will come up with relevant suggestions. The situation can be partly remedied by the information system that is currently in the making; it is important to consider the accessibility of this system.
- Representation of Czech interests before the ECJ will be coordinated by the Ministry of Foreign Affairs of the Czech Republic. The commissioning by the Ministry of Foreign Affairs is convenient since disputes concerning the European law are marked by an interaction of law and diplomacy – e.g. in situations when the European Commission is ready to file an action against the Czech Republic it is always preferable to avert the situation by a diplomatic activity and explanation. The interests of the Czech Republic will be defended before the ECJ not only in connection with reactions of the Czech Republic to the enforcement actions brought against it by the European Commission for breaches of the European law, but also in connection with petitions brought by the Czech Republic with the objective to revoke particular norms of the secondary European legislation (most importantly regulations and directives) and to intervene in disputes between other European entities and Member States where the concerns of the Czech Republic will be involved. The complex

problems and transition periods made it necessary to establish an office of a Czech deputy for the European Court of Justice (EU courts), a position that is analogous to the existing position of the representative for the European Court of Human Rights.

- The Czech Republic will have to undertake a formal modification of compensations for damages caused by the State's dereliction of duty. The liability to damages will also ensue from breach of the European law as well as from the existence and application of a law that is contradictory to the European law. The existing law can be amended; however, the lack of political will to explicitly acknowledge such international commitments and the corresponding reluctance to the modification of Czech laws will probably make it inevitable that this law will be based on a direct application of the European law. The important factor for the Czech judiciary is the growing willingness of the ECJ to acknowledge the liability of the Member State to the damages caused by an incorrect application of the European law by the national courts.
- A competitive selection of Czech judges for the European Court of Justice and for the Court of First Instance was held in spring 2004. The authorities commissioned to submit a list of nominees for the ECJ were the Constitutional Court, the Supreme Court, the Supreme Administrative Court, and the Czech Law Faculties. The position at the Court of First Instance is to be filled in compliance with the results of a competitive selection procedure. However, it was the Executive (the government, the Ministries of Justice and of Foreign Affairs) that had the final say in the selection of judges. The Parliament, experts and the general public were involved only marginally – this situation was only too obvious in comparison with the wide attention aroused by the nomination of the Czech EU Commissioner. The nominee for the ECJ is the Constitutional Court Justice Professor Jiří Malenovský, the nominee for the CFI is Irena Pelikánová, who has been a Professor of Business Law at the Charles University in Prague.